Office - Supreme Court, U.S.
FILED
AUG 9 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GERALD L. ARMSTRONG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS
OF THE UNITED STATES OF AMERICA

GERASH & ROBINSON, P.C.
Walter L. Gerash
1439 Court Place
Denver, Colorado 80202
(303) 825-5400

Counsel for Petitioner

August 1982.

QUESTIONS PRESENTED

Petitioner Gerald L. Armstrong brought suit alleging that he was systematically misled by authorized or apparently authorized agents of the United States government to believe that he was not eligible for Veteran's Benefits in relation to injuries which he sustained while a Cadet at the United Air Force Academy. The question presented for review pertains to the dismissal of the petitioner's action by the United States Court of Claims on the basis that petitioner could not bring a cause of action based on estoppel against the United States government, to wit:

1. Whether the United States can be estopped from denying benefits to an otherwise eligible citizen, where the citizen is prevented from applying for such benefits due to systematic misrepresentations and affirmative misconduct on the part of agents and employees of the United States.

Index

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
I. WHETHER THE UNITED STATES CAN BE ESTOPPED FROM DENYING BENEFITS WHERE THE APPLICANT RELIED ON SYSTEMATIC MISREPRESENTATIONS AND AFFIRMATIVE MISCONDUCT OF THE UNITED STATES	5
CONCLUSION	10
Appendix:	
Opinion of the United States Court of Claims	A-1

Table of Authorities

Cases	*Page*
Feres v. United States, 340 U.S. 135 (1950)	5, 9
Immigration & Naturalization Service v. Hibi, 414 U.S. 5 (1973)	6
L'Enfant Plaza v. D. C. Redevelopment, 564 F.2d 515 (D.C. Cir. 1974)	6
Lytle Co. v. Clark, 491 F.2d 834 (10th Cir. 1974)	6
Molton, Allen, & Williams, Inc. v. Harris, 613 F.2d 1176 (D.C. Cir. 1980)	8
Montana v. Kennedy, 366 U.S. 308 (1961)	6
Morris v. Andrus, 593 F.2d 851 (9th Cir. 1978) cert. denied, Morris v. United States, 444 U.S. 863 (1979)	6
Moser v. United States, 341 U.S. 41 (1951)	6
Oil Shale Corp. v. Morton, 370 F. Supp. 108 (Colo. 1973)	8
Oki v. Immigration & Naturalization Service, 598 F.2d 1160 (9th Cir. 1979)	8
Schweiker v. Hansen, 450 U.S. 785 (1980)	5, 6, 9, 10
United States v. Lazy C. Ranch, 481 F.2d 985 (9th Cir. 1973)	6, 8
United States v. Lucienne D'Hotelle, 558 F.2d 37 (1st Cir. 1977)	6
United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978)	6
United States v. Wharton, 514 F.2d 406 (9th Cir. 1975)	8
Yang v. Immigration & Naturalization Service, 574 F.2d 171 (3d Cir. 1978)	8

Table of Authorities (Continued)

Statutes	*Page*
United States Code:	
28 U.S.C. § 1255	*1*
28 U.S.C. § 1346	*5*
28 U.S.C. § 2101(c)	*1*
28 U.S.C. § 2672-2680	*5*
38 U.S.C. § 101(21)(D)	*2, 7*
38 U.S.C. § 331	*2*
38 U.S.C. § 3010(a)	*2, 4*
38 U.S.C. § 3010(b)(1)	*2, 4*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GERALD L. ARMSTRONG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES OF AMERICA

The petitioner Gerald L. Armstrong prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Claims entered on May 11, 1982.

Opinion Below

The opinion of the United States Court of Claims, not published, appears in the Appendix hereto.

Jursidiction

The order of the United States Court of Claims was entered May 11, 1982. This Petition for Writ of Certiorari was filed within ninety days pursuant to 28 U.S.C. § 2101(c). This Court's jursidiction is invoked under 28 U.S.C. § 1255.

Questions Presented

Petitioner Gerald L. Armstrong brought suit alleging that he was systematically misled by authorized or apparently authorized agents of the United States government and told that he was not eligible for Veteran's Benefits in relation to injuries which he sustained while a Cadet at the United Air Force Academy. The question presented for review pertains to the dismissal of the petitioner's action by the United States Court of Claims on the basis that petitioner could not bing a cause of action based on estoppel against the United States government, to wit:

1. Whether the United States can be estopped from denying Veteran's Benefits to an otherwise eligible citizen, where the citizen is prevented from applying for such benefits due to systematic misrepresentations and affirmative misconduct on the part of agents and employees of the United States.

Constitutional and Statutory Provisions Involved

38 U.S.C. § 101(21)(D):

"The term 'active duty' means. . .(D) Service as a cadet at the United States Military, Air Force, or Coast Guard Academy. . ."

38 U.S.C. § 331:

"For disability resulting from personal injuries suffered. . . or disease contracted in line of duty, . . .in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who is discharged or released under conditions other than dishonorable . . .compensation is provided in this subchapter. . . ."

38 U.S.C. 3010(a):

"Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim. . .shall not be earlier than the date of receipt of application therefor."

38 U.S.C. 3010(b)(1):

"The effective date of an award of disability compensation to a veteran shall be the day following the date of his discharge or release if application therefor is received within one year from such date of discharge or release."

Statement of the Case

On June 28, 1973, Gerald L. Armstrong was admitted as a Cadet to the United States Air Force Academy. On April 8, 1976, Mr. Armstrong dislocated his right knee during a judo class at the Academy. Mr. Armstrong was taken to the United States Air Force Academy Hospital, where he was advised that both of his knees needed surgery to realign them and prevent additional dislocations. Mr. Armstrong was told that without such corrective surgery, he would not be physically qualified for commissioning in the United States Air Force upon his graduation from the Academy. Relying upon this assertion of the Air Force doctor, Mr. Armstrong submitted to two operations, one on July 19, 1976, and another on January 10, 1977. These surgeries were not successful, and plaintiff was left with serious and permanent disability to both knees.

On June 1, 1977, Mr. Armstrong graduated from the United States Air Force Academy and was commissioned as a Second Lieutenant in the United States Air Force. On January 17, 1978, because of the disability of his knees, Mr. Armstrong was medically discharged from the United States Air Force. During discharge procedures at Lackland Air Force Base, in January 1978, the plaintiff was informed by at least three authorized or apparently authorized agents of the United States that he was not eligible for disability compensation benefits for the injuries he sustained while a Cadet at the United States Air Force Academy because those injuries were "incurred prior to service."

Mr. Armstrong was told by a person he believed to be supervisor of the Veteran's Administration Office in San Antonio, Texas, that Cadets at the Air Force Academy were not considered members of the active duty armed forces, and, as such, were not protected under provisions providing for disability compensation for injuries. Mr. Armstrong was also told by the Office of the Air Force Legal Counsel that since his injuries were incurred while a Cadet at the Air Force Academy, he was not eligible for disability

benefits. Finally, the United States Air Force Physical Evaluation Board, in its recommended finding, concluded that at the time of his injury, at the United States Air Force Academy, the petitioner was not on active duty.

Relying on this information, Mr. Armstrong did not apply for Veteran's Benefits, and on October 5, 1979, petitioner filed an action in the United States District Court for the District of Colorado, for damages resulting from alleged negligence in performing the surgery to his knees. The United States, in its answer to the complaint, asserted that Mr. Armstrong was barred from suing the United States under the Federal Tort Claims Act, because at the time of his injury he was on active duty with the United States Armed Forces. Mr. Armstrong was, therefore, caught between two different arms of the government, which on the one hand told him that he was not eligible for Veteran's Benefits because he was not on active duty when his injuries occurred, and on the other hand, told him that he could not sue the government because he was on active duty at the time of the injuries. On August 14, 1980, the United States District Court for the District of Colorado ordered the United States to admit or deny that at the time of his injuries the petitioner had been on active duty with the United States Air Force. Only after this order did the government admit that Mr. Armstrong had indeed been on active duty with the United States Air Force.

Under the applicable statutes regarding Veteran's Benefits, Mr. Armstrong was then free to apply for Veteran's Benefits, but they could only be awarded from the date of application. 38 U.S.C. § 3010(a). If Mr. Armstrong had not justifiably relied upon the statements of the agents of the government, he could have filed for such benefits within one year after discharge, and would have been eligible for compensation from the date of discharge. 38 U.S.C. § 3010(b)(1). Mr. Armstrong applied for benefits in July 1981, and was eventually awarded benefits from that date. Mr. Armstrong, because of the active misrepresentations of the government, was thus effectively barred from receiving benefits to which there is no question that he was entitled, for this three-year period.

After the admission by the government that the plaintiff had been on active duty at the time of his injuries, the district court

found that the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), applied, which exempts the government from liability under the Federal Tort Claims Act, 28 U.S.C. § 2672-2680, and § 1346. The court held that jurisdiction was proper under 28 U.S.C. § 1346 and allowed plaintiff leave to amend the complaint to state a claim for administrative abuse and equitable estoppel. The case was ordered transferred to the Court of Claims on July 7, 1981, jurisdiction being asserted under 28 U.S.C. § 1346. (The status of an individual defendant, Don H. Bodley, was not resolved by the District Court prior to transfer of the case to the Court of Claims.)

REASONS FOR GRANTING THE WRIT

I. WHETHER THE UNITED STATES CAN BE ESTOPPED FROM DENYING BENEFITS WHERE THE APPLICANT RELIED ON SYSTEMATIC MISREPRESENTATIONS AND AFFIRMATIVE MISCONDUCT OF THE UNITED STATES.

The question of what types of conduct by a government employee or agent may estop the government from denying statutory benefits to a person who is otherwise entitled to receive them, has never been decided by this Honorable Court. In *Schweicker* v. *Hansen*, 450 U.S. 785 (1980), this Court took note of this issue, without deciding, because "affirmative misconduct" on the part of government employees was held not to be involved. The Court thus left open the question of the principle of estoppel being applied against the government where such affirmative misconduct was involved.

Petitioner was systematically misled by employees and agents of the United States government to believe that he was not eligible for Veteran's Benefits because he was not considered to be on "active duty" while a Cadet at the United States Air Force Academy. He was told by two persons whom he reasonably believed to be in positions of authority that he was not eligible. The official findings of the United States Air Force Physical Evaluation Board also stated that he was not considered to have been on active duty. To obtain relief, petitioner was forced to file suit in the United States District Court and it was not until nearly one year after the filing of such suit that the government admitted

that petitioner had indeed been on active duty and was eligible to apply for benefits. The consistent pattern of erroneous information given to the petitioner and the refusal of the government to admit its mistake until ordered by the district court to do so, amount to the affirmative misconduct which was not present in the fact situation underlying *Schweiker* v. *Hansen*, *supra*, and make this case an appropriate one in which this Honorable Court should grant certiorari and fully address the principles of estoppel as applied against the government.

Estoppel against the government has been applied in different ways in many lower court cases. It has been held that while estoppel is rarely a proper theory against the government, there are instances where it would be unconscionable to allow the government to reverse an earlier position. *United States* v. *Lucienne D'Hotelle*, 558 F.2d 37 (1st Cir. 1977). It may be properly applied if government conduct threatens to work serious injustice and if the public's interest would not be unduly damaged by its imposition. *Morris* v. *Andurs*, 593 F.2d 851 (9th Cir. 1978), *cert. denied Morris* v. *United States*, 444 U.S. 863 (1979). *L'Enfant Plaza* v. *D. C. Redevelopment*, 564 F.2d 515 (D.C. Cir. 1977). *Cf. Lytle Co.* v. *Clark*, 491 F.2d 834 (10th Cir. 1974); *United States* v. *Lazy C Ranch*, 481 F.2d 985 (9th Cir. 1973).

Prior to the case of *Schweiker* v. *Hansen*, *supra*, this Honorable Court has also addressed the issue of estoppel a number of times. In *Montana* v. *Kennedy*, 366 U.S. 308 (1961), this Court left open the question of whether the government may be estopped on the basis of affirmative misconduct, while in *Immigration & Naturalization Service* v. *Hibi*, 414 U.S. 5 (1973), this Court found that there was no affirmative conduct, and, thus, no estoppel. The decisions of this Honorable Court and those of numerous lower courts have therefore assumed without deciding that in some circumstances estoppel may be available against the government. *See also Moser* v. *United States*, 341 U.S. 41 (1951).

The elements of estoppel, as noted in *United States* v. *Ruby Co.*, 588 F.2d 697 (9th Cir. 1978), are as follows:

> "(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has as right to believe it

> is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.... [t]he elements must [also] be read as requiring an affirmative misrepresentation or affirmative concealment of a material fact by the government."

The present case presents facts which fulfill the elements of estoppel and include allegations of affirmative misconduct on the part of the government agents. Mr. Armstrong was specifically told by two different individuals, one a supervisor for the Veteran's Administration, and another an officer in the Office of Legal Counsel for the United States Air Force, that he was not eligible to apply for Veteran's Benefits because he had not been considered on "active duty" while a Cadet at the United States Air Force Academy. Mr. Armstrong was further informed, through the official findings of the United States Air Force Physical Evaluation Board that he was not on active duty at the time of his injuries. Faced with these consistent replies to all of his attempts to find out his rights in connection with disability compensation, Mr. Armstrong could not in any way have been expected to file application for benefits. Based upon the representations made to him by these government employees, Mr. Armstrong justifiably believed that to file an application for Veteran's Benefits would have been a futile act.

The United States Court of Claims should not have dismissed the petitioner's cause of action without giving him the opportunity to prove that the actions of the government in the present case fit the elements of estoppel and affirmative misconduct. This case presents a clear factual question as to the misconduct of the government; the petitioner was told that he was not considered on "active duty" while a Cadet at the United States Air Force Academy, despite a specific statutory provision, 38 U.S.C. § 101(21)(D), which states that Air Force Cadets are to be considered on active duty. The petitioner was ignorant of this fact and reasonably relied upon the representations made to him by at least three separate government employees or agencies.

The misrepresentations to the petitioner concerning his eligibility for Veteran's Benefits was compounded and ratified even after the petitioner filed suit in the United States District Court.

It was only upon the order of the United States District Court that the United States finally admitted that the plaintiff was on active duty. In words of the District Court:

> "In the instant case allegedly defendants repeatedly and systematically misled plaintiff about his active duty status. Since defendants finally admitted that plaintiff was on active duty, it is certainly open to question when they discovered this and whether they actively misled him. Plaintiff relied on defendant's conduct to his detriment. Thus, all of the factors for estoppel are arguably present in the amended complaint and plaintiff has stated a cause of action sufficient to survive dismissal." (Order of the District Court, June 26, 1981).

It has been held that the government is immune from estoppel only where the acts of its agents are erroneous, illegal, or unauthorized. *Oil Shale Corp.* v. *Morton*, 370 F. Supp. 108 (Colo. 1973). When a government agent acts within his authority, the government can be estopped by his actions. *Molton, Allen, & Williams, Inc.* v. *Harris*, 613 F.2d 1176 (D.C. Cir. 1980); *United States* v. *Wharton*, 514 F.2d 406 (9th Cir. 1975); *United States* v. *Lazy C Ranch*, *supra*; *Oil Shale Corp.* v. *Morton*, *supra*. Estoppel must be accompanied by affirmative misconduct on the part of the government. *Oki* v. *Immigration & Naturalization Ser ice*, 598 F.2d 1160 (9th Cir. 1979); *Yang* v. *Immigration & Naturalization Service*, 574 F.2d 171 (3rd Cir. 1978).

The representations made to the petitioner were allegedly made to the petitioner during and immediately following his discharge from the Air Force for medical disability. The findings of the United States Air Force Physical Evaluation Board that the petitioner had not been on active duty at the time of his injury were part of its official recommendation to the Air Force. A Lieutenant Colonel Victor L. Negron from the Air Force Legal Counsel's Office specifically confirmed to the petitioner that since his injuries were incurred while a Cadet at the Air Force Academy, he was not eligible for disability benefits. A supervisor in the Veteran's Administration Office in San Antonio, Texas, told the petitioner the same information, as noted in an affidavit filed by the petitioner in the District Court, although the authority and position of this person, one Bruce D. Gillikin, was disputed by the government in an affidavit filed in the Court of Claims. The

allegations, however, which the dismissal of the case by the Court of Claims prevented the petitioner from even attempting to prove, specifically alleged that the plaintiff was told erroneous information by persons acting in the scope of their employment for the United States, and, thus, were sufficient to fall within the principles of estoppel as they have been delineated by the lower courts.

In the present case, the District Court specifically held that *Schweiker* v. *Hanson* was not controlling, because the plaintiff had alleged affirmative misconduct, and was applying for benefits which were based upon significantly different Congressional policies. While Veteran's Benefits are not a statutory entitlement, they are significantly different than Social Security Benefits. As was noted in *Feres* v. *Unites States*, *supra*, "The relationship between the government and members of its armed forces is 'distinctively federal in character'", at 143, and this principle was one of the primary considerations in that case's holding that servicemen and women on active duty with the armed forces could not bring suit under the Federal Tort Claims Act. Further, what is at issue in the petitioner's case is the payment of disability compensation benefits for injuries which he sustained while an active member of the United States Air Force, as opposed to welfare benefits or support payments.

One of the factors which may weigh against the application of estoppel against the government is the duty of the courts to observe conditions defined by Congress for charging the public treasury. *Schweiker* v. *Hansen*, *supra*. In the petitioner's case, however, all of the conditions defined by Congress for the payment of disability benefits to the petitioner have been satisfied. It is undisputed that the petitioner suffered permanent injuries while on active duty with the United States Armed Forces and he has been awarded partial disability benefits. The only issue relates to the entitlement of petitioner to benefits from the date of his discharge to the date of his application; to bar the petitioner from receiving these benefits which he would have received except for the pattern of misrepresentations made to him by the government would be to frustrate the Congressional purpose in providing for such disability compensation to veterans.

The District Court, in its opinion of June 26, 1981, directly addressed this issue:

> "I am mindful of the duty of federal courts to observe the conditions defined by Congress for charging the public treasury, and where a party not otherwise entitled to a statutory benefit seeks to invoke the estoppel doctrine, courts tread lightly for fear of breaching this duty. *Gressley* v. *Califano*, 609 F.2d 1265, 1267 (7th Cir. 1979). However, some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision-making process that the government may be estopped from disavowing the misstatement. *United States* v. *Wharton*, 514 F.2d at 412, *note* 6. Administrative regularity must sometimes yield to basic notions of fairness."

CONCLUSION

Petitioner's case would represent an appropriate opportunity for this Honorable Court to grant certiorari. Just as government exists to serve the people, there should be remedies under the law to correct mistakes and abuses of the government in dealing with its citizens. The dismissal of the petitioner's cause of action by the Court of Claims was not in accord with the principles expressed in *Schweiker* v. *Hansen*, *supra*, and other lower court decisions to the effect that there must be some circumstances under which the government is obliged under the law to accept responsibility for its mistakes. In the case of the petitioner, there was a pattern of affirmative misconduct on the part of the government, and allowing the petitioner to seek correction of this state of affairs can only vindicate the government's interest in fairness to its veterans.

GERASH & ROBINSON, P.C.
Walter L. Gerash
Attorneys for Plaintiff
1439 Court Place
Denver, CO 80202
(303) 825-5400